In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 913

PEOPLE,

Petitioner,

v.

[illegible] BRUNO, et al.,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District

RESPONDENTS' BRIEF

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OCTOBER TERM, 1961

No. 913

EDWARD PRANGER,

Petitioner,

vs.

S. WESLEY BREAK, et al.,

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District

RESPONDENTS' BRIEF

QUESTIONS PRESENTED FOR REVIEW

In Petitioner's Statement of Questions presented for Review, three abstract questions are set forth. Petitioner has failed to express any question in the terms and circumstances of the case.

When so expressed it becomes apparent that no substantial constitutional questions are presented.

I. Does the discharge of a public employee pursuant to Civil Service rules, for conduct unbecoming a County employee in calling for a strike against the

governmental agency, violate freedom of speech or freedom of press as protected by the Federal Constitution?

II. Does the discharge of a public employee who was accorded a full hearing in accordance with Civil Service Rules violate procedural due process under the 14th Amendment?

STATEMENT OF THE CASE

The facts of the case as found by the trial Court are as follows:

Respondents S. Wesley Break, Magda Lawson, Paul J. Young, Nancy E. Smith and Daniel D. Mikesell, were at all relevant times the duly elected and acting members of the Board of Supervisors, County of San Bernardino. Prior to the happening of the events herein, the said Board had established an Air Pollution Control District pursuant to Health and Safety Code 24198 to 24212, inclusive, and the members of the Board of Supervisors were at all relevant times acting as ex-officio members of the Air Pollution Control Board of said District.

At all times there existed a system of Civil Service in the County of San Bernardino.

Prior to August 20, 1958, George R. Bean was the duly appointed and acting Air Pollution Control Officer, and petitioner was employed by said District as a Clerk IV and was paid therefor the sum of $327.00 per month.

The petitioner was dismissed by the Air Pollution Control Officer, the appointing authority of the Air Pollution Control District, by the letter of August 20, 1958, addressed to petitioner and signed by the Air Pollution Control Officer. (Cl. Tr. p. 17.)

In petitioner's description of the record and statement of facts, petitioner has so confused factual material with irrelevant argument that we digress briefly to point out that respondent has never contended that petitioner's dismissal was effected by the letter of August 19, 1958 signed by S. Wesley Break, as chairman of the Board of Supervisors. Further, the action taken by the Air Pollution Control Board and by the Board of Supervisors on August 20, 1958, at 9:30 A.M. and 10:00 A.M., respectively, was not and did not purport to be action discharging petitioner. The minutes of these meetings show clearly that the action was for the purpose of directing the Air Pollution Control Officer to perform his duty by dismissing petitioner. (Plaintiff's Exhibits 4 and 5.)

Following the dismissal on August 20, 1958, by the Air Pollution Control Officer, petitioner filed his appeal and the matter regularly and duly came before respondent Civil Service Commission for hearing.

The Civil Service Commission on December 30, 1958, by findings and order duly entered after a full hearing, determined (a) that the dismissal of petitioner was legally effected, and (b) that the conduct of petitioner, as exemplified by his editorial comment, demonstrated a lack of essential loyalty, mature judgment and the proper spirit of cooperation so vital to

good government in the County, and constituted conduct unbecoming a public employee and constituted cause for dismissal pursuant to the Rules of the Civil Service Commission of the County of San Bernardino.

Upon trial of this action the Court below found that:

1. Petitioner was legally discharged by the Air Pollution Control Officer.

2. The findings of the Civil Service Commission were supported by substantial evidence, and that,

3. The dismissal of petitioner and the action of the Commission in affirming such dismissal did not deprive petitioner of any right of free speech or of any right protected by the Constitution of the State of California or of the United States. (Cl. Tr. p. 48.)

Judgment was entered for respondents and affirmed by the District Court of Appeal (186 A.C.A. 605). A petition for hearing by the Supreme Court of the State of California was denied on January 18, 1961.

ARGUMENT

I. THE DISCHARGE OF PETITIONER PURSUANT TO CIVIL SERVICE RULES FOR CONDUCT UNBECOMING A PUBLIC EMPLOYEE PRESENTS NO ISSUE OF FREE SPEECH OR FREE PRESS, PROTECTED BY THE FEDERAL CONSTITUTION.

Petitioner has sought, by dividing his contentions concerning the constitutional right of free speach and

press into two parts, to isolate one phrase contained in the order of discharge from all other circumstances comprising the case.

Petitioner was discharged for conduct unbecoming a public employee. That the conduct involved the use of the media of the press does not *ipso facto* render petitioner immune from accountability for irresponsible conduct.

Freedom of speech does not comprehend the right to speak on any subject at any time.

> *American Communications Association v. Douds*, 339 U.S. 924.

> "The character of every act depends upon the the circumstances in which it is done."
> *Schenk v. U. S.*, 249 U.S. 47.

Thus, the philosophy expressed in the editorial which was found to be inimical to public service and as such to constitute conduct unbecoming a public employee, is found in the circumstances of the case not to be an abstract philosophical advocacy of the right to strike as argued by petitioner; but a philosophy of immediate unlawful action to remedy an existing situation.

While petitioner subsequently denied that he intended to call for a strike, it is clear from the record that the Union Newsletter editorial could reasonably be interpreted as such. Taken in context the advocacy of the strike and other unlawful pressures

could only be viewed as approval of such methods as an immediate instrument of policy to be applied by the employees. (C.S.C. Tr. (2), pp. 185-186.)

It was so susceptible to this interpretation that the president of the County Employees' Union issued a retraction, and the Union, acting through its Executive Board, unanimously adopted a resolution repudiating the methods advanced in the editorial. (C.S.C. Tr. (2), pp. 119, 133, 136.)

The real issue, therefore, which was presented to the California Courts and decided adversely to petitioner, is whether in the light of all the facts revealed upon a full hearing, the conduct of petitioner in calling for illegal action as an immediate remedy for an existing situation may reasonably be held to constitute conduct unbecoming a public employee.

That the action advocated by petitioner would have been unlawful is not open to question.

In the absence of legislative authorization, public employees have no right to strike against the government.

Metropolitan Transit Auth. v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684;

City of Los Angeles v. Los Angeles Building & Constr. Trades Council, et al., 94 Cal. App. 2d 36;

Newmarker v. Regents of Univ. of Cal., 160 Cal. App. 2d 640.

Laws affecting labor-management relations generally have no application to government unless expressly made applicable.

U. S. v. United Mineworkers of America, 330 U.S. 258, 270;

International Union U.A.W., A.F. of L. v. Wisconsin Empl. Relations Board, 336 U.S. 245, 259.

Petitioner is well aware that no law exists giving these employees the right to negotiate the terms of their employment.

The Charter of San Bernardino County Article 2½ provides that the number, compensation, powers, duties and qualifications of County employees shall be prescribed and regulated by the Board of Supervisors of the County.

The Civil Service Ordinance enacted by the Board of Supervisors pursuant to the County Charter prescribes the method for selection and discharge of such employees. The Board has not delegated to any group of individuals its right to fix compensation or other terms of employment.

In citing a recent California Supreme Court case to the effect that public employees may be given the right to strike by statute, petitioner has ignored the fact that in so holding the Court was careful to preserve the principle that in the absence of such authority no such right exists.

Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684, 687.

It follows from an examination of the circumstances surrounding petitioner's dismissal that the issue here is not the limits of the right of free speech as petitioner contends; but is rather, to what extent public employment may be regulated without violating constitutional guarantees.

The rights of free speech and free press are not absolute, but are subject to proper regulations.

In the area of public employment, the Courts have uniformly held that such employment frequently entails a necessary surrender of certain rights which such employees would otherwise be free to enjoy as private citizens.

Beilan v. Board of Education of Philadelphia, 357 U.S. 399;

Garner v. Board of Public Works, 341 U.S. 716;

United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75;

City of Los Angeles v. Los Angeles Building & Construction Trades Council, et al., 94 Cal. App. 2d 36.

This Court has on numerous occasions approved the principle that as a condition of such employment a citizen may be required to comply with reasonable, lawful and nondiscriminatory terms laid down by the proper authority.

Slochower v. Board of Education of New York, 350 U.S. 551;

Adler v. Board of Education, 342 U.S. 485.

The "clear and present danger" doctrine has no application to activities of public employees where the sanctions imposed are suspension or dismissal from public service.

A government's right to protect the public service is not constitutionally dependent upon the existence of a public emergency.

Lerner v. Casey, 357 U.S. 468.

Under the principles established by this Court, the issue presented by petitioner's discharge is whether there is a rational relationship between the standard of conduct required and the governmental interest to be protected. If such relationship exists the issue of free speech is not involved.

> "So long as such restrictions and regulations are not arbitrary and bear a reasonable relation to legitimate ends to be attained . . . no question as to their constitutionality can arise."
>
> *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75.

That respondents had a legitimate interest in protecting the public service from activities having a tendency to create dissension and unrest among employees is clear. That petitioner's conduct could reasonably be found to have such tendency is equally clear.

The detrimental effect of such activity by public servants has been recognized by Congress. Pursuant to 5 U.S.C.A. 118 p. (3), (4); no person shall accept or hold employment in the government of the United

States or any agency thereof who participates in any strike or asserts the right to strike against the government of the United States or agency thereof.

Similar prohibitions by State and local governments have been sustained by Courts the country over as being a reasonable exercise of governmental authority over the public service.

National Labor Relations Board v. Jones and Laughlin Steel Corp., 154 F. 2d 932;

Perez v. Board of Police Commissioners, 78 Cal. App. 2d 638;

City of Jackson v. McLeod, 199 Miss. 676, Cert. Den. 328 U.S. 863;

Fraternal Order of Police v. Harris, 306 Mich. 68.

While reasonable men may differ as to the necessity for such regulation, it cannot fairly be said that there is no rational relationship between the standard of conduct required by respondents and the governmental interest which it is their duty to protect.

II. THE DISCHARGE OF PETITIONER WHO WAS ACCORDED A FULL HEARING PURSUANT TO CIVIL SERVICE PROCEDURES TENDERS NO ISSUE OF DUE PROCESS UNDER THE 14TH AMENDMENT.

In petitioner's Statement of Questions presented for Review, the second question raises a fictional issue not encompassed in the real issues involved in petitioner's discharge. There was no failure to specify the particular wrongful act.

Respondents contend that the reasons for petitioner's dismissal were set forth with sufficient certainty.

Petitioner was charged with two specific acts constituting conduct unbecoming a public employee. The order of discharge set forth the ground as stated in the Civil Service Rules. The dates and places of such conduct were specified in the order of discharge. The fact that petitioner may have made other statements and committed other acts at the same time does not render the order vague and uncertain.

In cases depending upon civil sanctions only for enforcement, it is sufficient if the language is such as to fairly apprise men of common intelligence of the charges against them.

In support of his contention that the charge was uncertain, petitioner relies upon the standard of certainty required in statutes involving criminal sanctions.

The distinction is clearly defined in the cases cited by petitioner.

> *Winters v. New York*, 333 U.S. 507, 515 ("The standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanctions for enforcement.");
>
> *Cole v. Arkansas*, 338 U.S. 345.

It is apparent from the record that petitioner was fully aware of the nature of the acts for which he was discharged. (C.S.C. Tr. (2), p. 172.)

There is no allegation in the petition, and the record does not disclose any request, that a more particular statement of the charges against petitioner be furnished. (C.S.C. Tr. (2), p. 6.)

Petitioner was accorded a full hearing at which he clearly demonstrated knowledge of the nature of the charges against him.

The Courts have repeatedly upheld dismissal proceedings founded upon charges less specific than those herein proffered.

Beilan v. Board of Education of Philadelphia, 357 U.S. 399 (incompetency);

Neuwald v. Brock, 12 Cal. 2d 662 (language of Commission's rule held sufficient);

Board of Education of City of Los Angeles v. Swan, 41 Cal. 2d 546 (unprofessional conduct);

Goldsmith v. Board of Education, 66 Cal. App. 157 (unprofessional conduct);

Boyd v. Pendergast, 57 Cal. App. 504 (neglect of duty was held sufficient without setting out the acts making up the delinquency charge);

Enright v. Williams, 116 Cal. App. 360 (misconduct and violation of Commission's Rules and Regulations held sufficient).

CONCLUSION

It is apparent from petitioner's argument in this case that petitioner conceives Civil Service Laws as functioning only for the limited purpose of granting employees tenure of office. Having served this purpose, petitioner would have you believe that the employee relationship then escapes completely from the control of the governmental agency involved.

This is implicit in petitioner's contention that the State or other governmental agency must be subject to the same constitutional limitations when dealing with its own employees, that it is when dealing with persons in their private capacity.

To contend that the governmental agency may create an office or employment; may give permanent status to the occupant of such office, but cannot establish and maintain reasonable standards of conduct for such employees, is to ignore the ultimate purpose of Civil Service which is to promote the efficiency and integrity of the public service.

Such contention also ignores the great body of law both statutory and decisional, relating to the proper control and supervision of public employees.

There is nothing new in the issues involved in this case except petitioner's novel theory that a governmental agency by the mere act of adopting a Civil Service Ordinance thereby loses its right to prescribe the standards of conduct of its employees. Such theory is supported only by numerous quotations wrenched from context and relevancy, and is contrary

to the principle repeatedly stated by this Court and by Courts the country over that a government may constitutionally require that its employees comply with reasonable and nondiscriminatory terms of employment.

Respondents submit that the decision of the District Court of Appeal is consistent with the principles of due process so carefully carved out by this Court in innumerable decisions affecting the rights and responsibilities of public employees.

Wherefore, respondents pray that the application for writ of certiorari be denied.

Dated, San Bernardino, California,
June 7, 1961.

Respectfully submitted,

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